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Attorney for Defendant: RICARDO HERRERA-ARTEAGA

**UNITED STATES DISTRICT COURT**  
**SOUTHERN DISTRICT OF CALIFORNIA**

(Hon. William Q. Hayes)

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RICARDO HERRERA-ARTEAGA,

Defendant.

Criminal Case No.: 08cr1694 - WQH  
Magistrate Case No.: 08mj1338

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
DEFENDANT'S MOTIONS**

**I.**

**STATEMENT OF FACTS**

On April 28, 2008, within the Southern District of California, defendant Ricardo Herrera-Arteaga, who previously had been excluded, deported and removed from the United States to Mexico, was found in the United States, without the Attorney General of the United States or his designated successor, the Secretary of the Department of Homeland Security (Title 6, United States Code, Sections 202(3) and (4), and 557), having expressly consented to the defendant's reapplication for admission into the United States; in violation of Title 8, United States Code, Sections 1326(a) and (b)- Deported Alien Found in the United States (Felony).

1 II.

2 **THIS COURT SHOULD ORDER PRESERVATION OF EVIDENCE AND**  
 3 **PRODUCTION OF DISCOVERY**

4 Mr. Herrera-Arteaga moves this court for the production by the government of the  
 5 following discovery and for the preservation of evidence. This request is not limited to those  
 6 items that the prosecutor has actual knowledge of, but rather includes all discovery listed below  
 7 that is "in the possession, custody, or control of any federal agency participating in the same  
 8 investigation of the defendant." United States v. Bryan, 868 F.2d 1032, 1036 (9th Cir.), cert.  
 9 denied, 493 U.S. 858 (1989).  
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- 11 1. **Mr. Herrera-Arteaga's Statements.** The government must disclose:  
 12 (a) copies of any written or recorded statements made by Mr. Herrera-Arteaga;  
 13 (b) copies of any written record containing the substance of any statements made  
 14 by Mr. Herrera-Arteaga; and:  
 15 (c) the substance of any statements made by Mr. Herrera-Arteaga which the  
 16 government intends to use, for any purpose, at trial. See Fed. R. Crim. P.  
 17 16(a)(1)(A).

18 2. **Arrest Reports, Notes and Dispatch Tapes.** The defense also specifically  
 19 requests that all arrest reports, notes and dispatch or any other tapes that relate to the  
 20 circumstances surrounding his arrest or any questioning, if such reports have not already been  
 21 produced in their entirety, be turned over to him. This request includes, but is not limited to,  
 22 any rough notes, records, reports, transcripts or other documents in which statements of the  
 23 defendant or any other discoverable material is contained. This is all discoverable under Fed. R.  
 24 Crim. P.16(a)(1)(A); 16(a)(1)(B), 373 U.S. 83 (1963). See also Loux v. United States, 389 F.2d  
 25 911 (9<sup>th</sup> Cir.1968). Arrest reports, investigator's notes, memos from arresting officers, dispatch  
 26 tapes, sworn statements, and prosecution reports pertaining to the defendant are available under  
 27 Fed. R. Crim.P.16(a)(1)(E) and Fed. R. Crim. P. 26.2. Preservation of rough notes is requested,  
 28 whether or not the government deems them discoverable.

3. **Any Information That May Result in a Lower Sentence Under The**

1 **Guidelines.** As discussed above, this information is discoverable under Brady v. Maryland,  
 2 373 U.S.83 (1963). This request includes any cooperation or attempted cooperation by the  
 3 defendant, as well as any information that could affect any base offense level or specific  
 4 offense. characteristic under Chapter Two of the Guidelines. Also included in this request is  
 5 any information relevant to a Chapter Three adjustment, a determination of the defendant's  
 6 criminal history, or any other application of the Guidelines.

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 8 4. **Mr. Herrera-Arteaga's Prior Record.** Mr. Herrera-Arteaga requests disclosure of  
 9 his prior record. See Fed. R. Crim. P. 16(a)(1)(B).

10 5. **Any Proposed 404(b) and (609) Evidence.** The government must produce evidence  
 11 of prior similar acts under Fed. R. Crim. Proc., 16(a)(1)(C) and Fed. R. Evid. 404(b) and 609. In  
 12 addition, "upon request of the accused, the prosecution shall provide reasonable notice in  
 13 advance of trial of the general nature" of any evidence the government proposes to introduce  
 14 under Fed. R. Evid. 404(b) at trial. This applies not only to evidence which the government may  
 15 use as rebuttal. United States v. Vega, 1888 F. 3d 1150 (9th Cir. 1999). The defendant is entitled  
 16 to "reasonable notice" so as to "reduce surprise." Preclude "trial by ambush" and prevent the  
 17 "possibility of prejudice," *Id.*, and he requests such notice at least two weeks before trial in  
 18 order to give the defense time to adequately investigate and prepare for trial.  
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21 6. **Evidence Seized.** The defendant requests production of evidence seized as a result  
 22 of any search. Fed. R. Crim. Proc. 16(a)(1)(C).

23 7. **Documents and Tangible Objects.** Mr. Herrera-Arteaga requests the opportunity to  
 24 inspect, copy, and photograph all documents and tangible objects which are material to the  
 25 defense or intended for use in the government's case-in-chief or were obtained from or belong to  
 26 him. See Fed. R. Crim. P. 16(a)(1)(C). Specifically, Mr. Herrera-Arteaga requests that the  
 27 government provide him with a copy of his statements made to any and all government agents,  
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1 state or federal, which occurred prior to his arrest. This includes all reports prepared by any  
2 peace officer.

3 8. **Reports of Scientific Tests or Examinations.** Mr. Herrera-Arteaga requests the  
4 reports of all tests and examinations which are material to the preparation of the defense or are  
5 intended for use by the government at trial. See Fed. R. Crim. P. 16(a)(1)(D). Mr. Herrera-  
6 Arteaga notes that no fingerprint analyses have been produced. If such analyses exist, Mr.  
7 Herrera-Arteaga requests a copy.

8 9. **Expert Witnesses.** Mr. Herrera-Arteaga requests the name and qualifications of any  
9 person that the government intends to call as an expert witness. See Fed. R. Crim. P.  
10 16(a)(1)(E). In addition, Mr. Herrera-Arteaga requests written summaries describing the bases  
11 and reasons for the expert's opinions. See *id.* This request specifically applies to any fingerprint  
12 and handwriting experts that the government intends to call.

13 10. **Brady Material.** Mr. Herrera-Arteaga requests all documents, statements, agents'  
14 reports, and tangible evidence favorable to the defendant on the issue of guilt or punishment.  
15 See Brady v. Maryland, 373 U.S. 83 (1963), Williams v. Taylor, 120 S.Ct. 1479 (2000),  
16 Strickler v. Greene, 527 U.S. 263 (1999). Mr. Herrera-Arteaga maintains that his police file  
17 constitutes Brady material and therefore it must be produced.

18 In addition, impeachment evidence falls within the definition of evidence favorable to  
19 the accused, and therefore Mr. Herrera-Arteaga requests disclosure of any impeachment  
20 evidence concerning any of the government's potential witnesses, including prior convictions  
21 and other evidence of criminal conduct. See United States v. Bagley, 473 U.S. 667 (1985);  
22 United States v. Agurs, 427 U.S. 97 (1976); Kyles v. Whitley, 514 U.S. 419 (1995). In addition,  
23 Mr. Herrera-Arteaga requests any evidence tending to show that a prospective government  
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1 witness: (i) is biased or prejudiced against the defendant; (ii) has a motive to falsify or distort  
2 his or her testimony; (iii) is unable to perceive, remember, communicate, or tell the truth; or (iv)  
3 has used narcotics or other controlled substances, or has been an alcoholic.

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5 11. **Request for Preservation of Evidence.** Mr. Herrera-Arteaga specifically requests  
6 the preservation of all physical or documentary evidence that may be destroyed, lost, or  
7 otherwise put out of the possession, custody, or care of the government and which relate to the  
8 arrest or the events leading to the arrest in this case. Mr. Herrera-Arteaga specifically requests  
9 the preservation of all video or photographic film evidence of defendant's attempt to flee arrest  
10 from the United States Border Patrol and other law enforcement officers.

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12 12. **Witness Addresses.** Mr. Herrera-Arteaga requests the name and last known  
13 address of each prospective government witness. He also requests the name and last known  
14 address of every witness to the crime or crimes charged (or any of the overt acts committed in  
15 furtherance thereof) who will not be called as a government witness.

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17 13. **Jencks Act Material.** Mr. Herrera-Arteaga requests production in advance of trial  
18 of all material discoverable pursuant to the Jencks Act, 18 U.S.C. § 3500. Advance production  
19 will avoid needless delays at pretrial hearings and at trial. This request includes any "rough"  
20 notes taken by the agents in this case; these notes must be produced pursuant to 18 U.S.C. §  
21 3500(e)(1). This request also includes production of transcripts of the testimony of any witness  
22 before the grand jury. See 18 U.S.C. § 3500(e)(3).

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24 14. **Residual Request.** Mr. Herrera-Arteaga intends by this discovery motion to invoke  
25 his rights to discovery to the fullest extent possible under the Federal Rules of Criminal  
26 Procedure and the Constitution and laws of the United States. Mr. Herrera-Arteaga requests that  
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1 the government provide him and his attorney with the above-requested material sufficiently in  
2 advance of trial.

3 15. **Evidence of Criminal Investigation of Any Government Witness.** The defense  
4 requests any evidence that any prospective witness is under investigation by federal, state or  
5 local authorities for any criminal conduct. United States v. Chitty, 760 F.2d 425 (2d Cir. 1985).  
6

7 16. **Evidence of Bias or Motive to Lie.** The defense requests any evidence that any  
8 prospective government witness is biased or prejudiced against the defendant, or has a motive to  
9 falsify or distort his or her testimony. Pennsylvania v. Ritchie, 480 U.S. 39 (1987); United  
10 States v. Strifler, 851 F.2d 1197 (9<sup>th</sup> Cir. 1988).  
11

12 17. **Evidence Affecting Perception, Recollection, Ability to Communicate, or**  
13 **Veracity.** The defendant requests any evidence, including any medical or psychiatric report or  
14 evaluation, tending to show that any prospective witness's ability to perceive, remember,  
15 communicate, or tell the truth is impaired; and any evidence that a witness has ever used  
16 narcotics or other controlled substance, or has ever been an alcoholic. United States v. Strifler,  
17 851 F.2d 1197 (9<sup>th</sup> Cir. 1988); Chavis v. North Carolina, 637 F.2d 213, 224 (4<sup>th</sup> Cir. 1980).  
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19 18. **Name of Witnesses Favorable to the Defendant.** The defendant requests the  
20 name of any witness who made any arguably favorable statement concerning the defendant or  
21 who could not identify her or was unsure of her identity, or participation in the crime charged.  
22 Jackson v. Wainwright, 390 F.2d 288 (5<sup>th</sup> Cir. 1968); Chavis v. North Carolina, 637 F.2d  
23 213,223 (4<sup>th</sup> Cir. 1980); Jones v. Jago, 575 F.2d 1164,1168 (6<sup>th</sup> Cir. 1978); Hudson v.  
24 Blackburn, 601 F.2d 785 (5<sup>th</sup> Cir. 1979), cert. denied,444 U.S. 1086 (1980).  
25

26 19. **Statements Relevant to the Defense.** The defendant requests disclosure of any  
27 statement that may be "relevant to any possible defense or contention" that she might assert.  
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1 United States v. Bailleaux, 685 F.2d 1105 (9<sup>th</sup> Cir. 1982). This includes Grand Jury transcripts  
2 which are relevant to the defense motion to dismiss the indictment.

3 20. **Giglio Information**. Pursuant to Giglio v. United States, 405 U.S. 150 (1972), the  
4 defendant requests all statements and/or promises, expressed or implied, made to any  
5 government witnesses, in exchange for their testimony in this case, and all other information  
6 which could arguably be used for the impeachment of any government witness.  
7

8 21. **Agreements between the Government and Witnesses**. The defendant requests  
9 discovery regarding any express or implicit promise, understanding, offer of immunity, of past,  
10 present, or future compensation, or any other kind of agreement or understanding, including any  
11 implicit understanding relating to criminal or civil income tax, forfeiture or fine liability,  
12 between any prospective government witness and the government (federal, state and/or local).  
13 This request also includes any discussion with a potential witness about or advice concerning  
14 any immigration benefits, any contemplated prosecution, or any possible plea bargain, even if  
15 no bargain was made or the advice not followed.  
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18 22. **Informants and Cooperating Witnesses**. The defendant requests disclosure of the  
19 names and addresses of all informants or cooperating witnesses used or to be used in this case,  
20 and in particular, disclosure of any informant who was a percipient witness in this case or  
21 otherwise participated in the crime charged against the defendant. The government must  
22 disclose the informant's identity and location, as well as disclose the existence of any other  
23 percipient witness unknown or unknowable to the defense. Roviaro v. United States, 353 U.S.  
24 52, 61-62 (1957). The government must disclose any information derived from informants  
25 which exculpates or tends to exculpate the defendant.  
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1           23. **Bias by Informants or Cooperating Witnesses.** The defendant requests disclosure  
2 of any information indicating bias on the part of any informant or cooperating witness. *Giglio v.*  
3 *United States*, 405 U.S. 150 (1972). Such information would include what, if any, inducements,  
4 favors, payments or threats were made to the witness to secure cooperation with the authorities.  
5

6           24. **Personnel Records of Government Officers Involved in the Arrest.** The  
7 defendant requests disclosure of any information indicating bias on the part of any informant or  
8 cooperating witness. *Giglio v. United States*, 405 U.S. 150 (1972). Such information would  
9 include what, if any, inducements, favors, payments or threats were made to the witness to  
10 secure cooperation with the authorities.  
11

12           25. **Training of Relevant Law Enforcement Officers.** Defendant requests copies of  
13 all written, videotaped or otherwise recorded policies or training instructions or manuals issued  
14 by all law enforcement agencies involved in the case ( *United States Customs Service, Border*  
15 *Patrol, INS, Homeland Security, etc.*) to their employees regarding: (a) the handling of vehicles  
16 suspected to be transporting contraband across the port of entry; (b) the referral to secondary  
17 inspection of the persons with in those vehicles; (c) the detention of individuals within those  
18 vehicles, including the proper means of obtaining consent to search and what constitutes  
19 consent to search; (e) the informing of suspects of their Constitutional rights; (f) the questioning  
20 of suspects and witnesses. Defendant also requests all written or otherwise attainable  
21 information regarding the training of Customs agents at ports of entry in California to detect or  
22 discover narcotics and/or people in vehicles entering the United States, including any training  
23 offered to Border Patrol, INS, or officers of Homeland Security Department, by the DEA or  
24 other law enforcement agencies or individuals.  
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26. **Performance Goals and Policy Awards.** Defendant requests disclosure of information regarding standards used for measuring, compensating or reprimanding the conduct of all law enforcement officers involved in the case (Customs, Border Patrol, INS, etc.) to the extent such information relates to the detection of contraband. This request specifically includes information concerning performance goals, policy awards, and the standards used by Customs for commending, demoting, or promoting agents for their performance at the port of entry and their success or failure to detect illegal narcotics and/or people in general.

27. **Opportunity to Weigh, View and Photograph the Evidence Seized.** Defendant hereby requests an opportunity to view, photograph, and weigh any evidence allegedly confiscated in this case.

## II.

## MOTION FOR SUPPRESSION OF STATEMENTS

**A. MR. HERRERA-ARTEAGA IS ENTITLED TO AN EVIDENTIARY HEARING TO DETERMINE WHETHER HIS STATEMENTS, IF ANY, WERE VOLUNTARILY MADE AND ELICITED IN COMPLIANCE WITH MIRANDA.**

The Supreme Court has held that the prosecution may not use statements, whether exculpatory or inculpatory, stemming from a custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). Custodial interrogation is questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Id.* See also *Orozco v. Texas*, 394 U.S. 324, 327 (1969).

When interrogation takes place without the presence of an attorney, and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant intelligently

1 and voluntarily waived her privilege against self-incrimination and her right to retained or  
2 appointed counsel. *Miranda*, 384 U.S. at 475. A waiver of the right to remain silent and the  
3 right to counsel must be made knowingly, intelligently and voluntarily in order to be effective.  
4 *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). The standard of proof for a waiver of this  
5 constitutional right is high. *Miranda*, 384 U.S. at 475. *See United States v. Heldt*, 745 F.2d  
6 1275, 1277 (9th Cir. 1984) (the burden on the government is great;  
7 the court must indulge every reasonable presumption against waiver of fundamental  
8 constitutional rights.)

9  
10 The validity of the waiver depends upon the particular facts and circumstances  
11 surrounding the case, including the background experience, and conduct of the accused.  
12 *Edwards v. Arizona*, 451 U.S. 477, 472 (1981).

13  
14 The government in the present case has the burden of proving that Mr. Herrera-Arteaga  
15 was read his *Miranda* rights and intelligently and voluntarily waived those rights in all  
16 situations where Mr. Herrera-Arteaga reasonably believed that he was not free to leave. *See*  
17 *United States v. Estrada-Lucas*, 651 F.2d 1261, 1265 (9th Cir. 1980).

18  
19 Even when the procedural safeguards of *Miranda* have been satisfied, a defendant in a  
20 criminal case is deprived of due process of law if his conviction is founded, in whole or in part,  
21 upon an involuntary confession. *Jackson v. Denno*, 378 U.S. 368, 387 (1964). The government  
22 bears the burden of proving that a confession is voluntary by a preponderance of the evidence.  
23 *Lego v. Twomey*, 404 U.S. 477, 483 (1972); *see also* 18 U.S.C. § 3501(a).

24  
25 A statement must be the product of a rational intellect and free will to be voluntary.  
26 *Blackburn v. Alabama*, 361 U.S. 199, 208 (1960). In determining whether a defendant's will  
27 was overborne, the totality of the circumstances must be considered. *Schneckloth v.*  
28

1 *Bustamonte*, 412 U.S. 218, 226 (1973). A confession is deemed involuntary whether coerced by  
 2 physical intimidation or psychological pressure. *Townsend v. Sain*, 372 U.S. 293, 307 (1962).  
 3 It must not be extracted by any sort of threats of violence, nor obtained by any direct or implied  
 4 promises, however slight, nor by the exertion of any improper influences. *United States v.*  
 5 *Tingle*, 658 F.2d 1332, 1335 (9th Cir. 1981). A hearing is therefore required to determine  
 6 whether the statements made by Mr. SERNA were voluntary.<sup>1</sup>

### 8 **III.**

#### 9 **MOTION TO FILE ADDITIONAL MOTIONS**

10 At this time the defense is trying to make contact with exculpatory witnesses whose  
 11 whereabouts are unknown. It is conceivable the defendant will file additional motions relating  
 12 to prosecutorial delay resulting in unfair prejudice to the defendant; as well as other applicable  
 13 motions, including suppression motions. Lastly, given limited discovery has been produced,  
 14 additional motions maybe necessary once counsel has had the opportunity to review same.  
 15

### 16 **V.**

#### 17 **CONCLUSION**

18 For the foregoing reasons, Mr. Herrera-Arteaga respectfully requests that the Court grant  
 19 the motions made by the Defendant.  
 20

21 Respectfully Submitted this 14<sup>th</sup> day of July, 2008.

**SCHROTH & SCHROTH**

22 By: s/ Robert Schroth Sr.  
 23 ROBERT E. SCHROTH, SR.,  
 24 Attorney for Defendant  
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26  
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 28 <sup>1</sup> It is unclear from the discovery if the defendant made any statements. Therefore, the motion is being filed as a  
 prophylactic measure.

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Attorney for Defendant: RICARDO HERRERA-ARTEAGA

**UNITED STATES DISTRICT COURT**  
**SOUTHERN DISTRICT OF CALIFORNIA**

(Hon. William Q. Hayes)

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RICARDO HERRERA-ARTEAGA,

Defendant.

Criminal Case No.: 08cr1694 - WQH

Magistrate Case No.: 08mj1338

**NOTICE OF MOTION AND MOTION  
FOR**

**1) DISCOVERY/PRESERVE EVIDENCE;**

**2) LEAVE TO FILE MOTIONS**

Date:

Time:

Judge: Hon. William Q. Hayes

**TO UNITED STATES ATTORNEY KAREN P. HEWITT, ASSISTANT UNITED  
STATES ATTORNEY CAROLINE HAN:**

NOTICE IS HEREBY GIVEN that on July 14, 2008, at 2:00 p.m., or as soon thereafter  
as the matter may be heard, in the courtroom of Honorable Judge Hon. William Q. Hayes of this  
court, located at 940 Front Street, San Diego, California, 92101, Defendant, Ricardo Herrera-  
Arteaga, by and through his attorney of record, Robert E. Schroth Sr., will move the court for an  
Order granting the following motions: 1) to compel and preserve discovery; and 2) to Leave to  
file additional motions.

**MOTION**

The defendant Ricardo Herrera-Arteaga, by and through his counsel, Robert E. Schroth, Sr., pursuant to United States Constitution, Fed. R. Crim. Proc., Rules 8 and 14, and applicable case law and local rules, moves this Court for an Order: 1) to compel and preserve discovery; and 2) Leave to file additional motions.

These motions are based upon the instant Motions and Notice of Motions, the attached Statements of Facts and Memorandum of Points and Authorities, the files and records in the above-captioned matter, and any and all other materials which may be brought to this Court's attention prior to or during the hearing on these motions.

Respectfully Submitted this 14<sup>th</sup> day of July, 2008.

**SCHROTH & SCHROTH**

By: /s/ Robert Schroth Sr.  
ROBERT E. SCHROTH, Sr.  
Attorney for Defendant



1 Re: USA v. Herrera-Arteaga  
2 Criminal Case No: 08cr1694-WQH

3 **PROOF OF SERVICE BY MAIL**

4 **STATE OF CALIFORNIA COUNTY OF SAN DIEGO**

5 I am employed in San Diego, California; I am over the age of eighteen years and am  
6 not a party to this action; my business address is 2044 First Avenue, Suite 200, San Diego,  
CA 92101.

7 On July 14, 2008, I served the following document(s) described as:

8 **NOTICE OF MOTION AND MOTION FOR 1) DISCOVERY 2) PRESERVE  
EVIDENCE 3) LEAVE, MEMORANDUM OF POINTS AND AUTHORITIES**

9 On the interested parties to this action by efile service:

10 Karen P. Hewitt  
11 United States Attorney,  
12 Caroline Han  
13 Assistant United States Attorney  
Federal Office Building  
880 Front Street, Room 6293  
San Diego, California 92101

14 I am "readily familiar" with the firm's practice of collection and processing correspondence  
15 for mailing. Under that practice it would be deposited with the U.S. Postal service on that  
16 same day with postage thereon fully prepaid at San Diego, California in the ordinary course  
17 of business. I am aware that on motion of the party served, service is presumed invalid if  
postal cancellation date or postage meter date is more than one day after date of deposit for  
mailing in affidavit.

18 I declare under penalty of perjury under the laws of the State of California that the  
19 above is true and correct.

20 s/ Robert E. Schroth Sr.  
21 Robert E. Schroth Sr.  
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